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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1140

KEITH LOWE, *et al.*

Petitioners

v.

SECRETARY OF STATE
AND
ATTORNEY GENERAL OF THE UNITED STATES

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTORY & REGULATORY PROVISIONS INVOLVED	3
STATEMENT	7
REASONS FOR GRANTING THE WRIT	12
CONCLUSION	26

APPENDIX

Judgment of the United States Court of Appeals for the District of Columbia Circuit	27

TABLE OF AUTHORITIES

CASES:

Baggett v. Bullitt, 370 U.S. 360	13
Brownell v. Shung, 352 U.S. 180	15, 17, 18, 22
Ceballos v. Shaughnessy, 352 U.S. 599 (1957)	14
Chew v. Colding, 344 U.S. 590	16
Dessalernos v. Savoretti, 356 U.S. 269 (1958)	14
Ex Parte Endo, 283 U.S. 304	19
Geigow v. Ubl, 239 U.S. 3	15
Gastelum-Quinones v. Kennedy, 374 U.S. 469	23

Page

Jay v. Boyd, 351 U.S. 345 . . . . . 21, 25

Keyishian v. Board of Regents, 385 U.S. 589 13

Kleindienst v. Mandel, 408 U.S. 753 . . . . . 1, 12, 13, 14, 20, 21-22, 25

Knauff v. Shaughnessy, 338 U.S. 537 20

McGrath v. Kristensen, 340 U.S. 162 (1950) 14, 18

Rowoldt v. Perfetto, 355 U.S. 115 . . . . . 3, 23

Rusk v. Cort, 369 U.S. 367 18

Shung v. Brownell, 346 U.S. 906 15

Sweezy v. New Hampshire, 354 U.S. 234 13

U.S. ex rel Hintopolous v. Shaughnessy, 253 U.S. 72 (1957) 14

* * *

Di Mattina v. I.N.S., Petition for Certiorari Pending, No. 74-202 19

Dunn v. I.N.S., Petition for Certiorari Pending, No. 74-321 19

* * *

Berdo v. I.N.S., 432 F. 2d 824 (6th Cir.) 24

Estrada v. Abrens, 296 F. 2d 690 (5th Cir.) 19

Faustino v. I.N.S., 432 F. 2d 429 (2nd Cir.), Certiorari denied, 401 U.S. 921 19

Kokoris v. Johnson, 195 F. 2d 518 (4th Cir.) 19

Mandel v. Mitchell, 325 F. Supp. 620 (E.D.N.Y. 1971) . 19

Marcello v. Kennedy, 194 F. Supp. 750 (DCDC) 19

Page

STATUTES:

Act of May 22, 1918, 40 Stat. 559 15

Act of May 26, 1924, 43 Stat. 153 15

Act of October 3, 1965, 79 Stat. 921 17

5 U.S.C. 701. 17-18

8 U.S.C. 212. 22

8 U.S.C. 254. 1

8 U.S.C. 1101 . . . . . 17, 18

8 U.S.C. 1103 23

8 U.S.C. 1104 23

8 U.S.C. 1153 8

8 U.S.C. 1182 . . . . . 1, 2, 3, 8, 12, 20, 21, 22, 23, 24, 25

8 U.S.C. 1251 . . . . . 3, 22, 23

8 U.S.C. 1255 . . . . . 8, 16, 17, 19, 24

28 U.S.C. 2201. 18

CONGRESSIONAL REPORTS:

S. Rep. No. 745, 89th Cong., 1st Sess., p. 22 17

Page

EXECUTIVE ORDERS:

Executive Order No. 11652, March 10, 1972 . . . . . 16, 21

FEDERAL REGULATIONS:

8 C.F.R. 237 17

8 C.F.R. 242 . . . . . 16, 24

8 C.F.R. 245 16

8 C.F.R. 3 17

22 C.F.R. 42 . . . . . 1, 7, 8, 16, 21, 23

Visa Manual 42.130, Form Proscribed TL-541 21

SECONDARY AUTHORITIES:

Gordon & Rosenfield, *Immigration Law and Procedure* 16, 17

IMMIGRATION & NATIONALITY LAWS 15

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit which sustains a judgment of the United States District Court dismissing petitioners' complaint for lack of jurisdiction and for failure to state a claim upon which relief can be granted.

OPINIONS BELOW

Neither the District Court nor the Court of Appeals entered opinions. The judgment of the Court is set forth at Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on December 10, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the light of *Kliendienst v. Mandel*, 408 U.S. 753, District Court had jurisdiction of action by United States citizens and their alien colleague in an American university to review questions of law relating to the alien's statutory eligibility to obtain an immigrant visa?

2. Whether an alien, residing in the United States at the time of his application for an immigrant visa but required as a native of the Western Hemisphere to apply for permanent residence at an American consulate abroad, has standing to sue the Attorney General and the Secretary of State to obtain a judicial determination regarding the construction and implementation of the Immigration and Nationality Act by those officials?

3. Whether a State Department regulation which limits information provided an applicant for an immigrant visa to the "Provision of law and the regulation issued thereunder", 22 C.F.R. 130(a), and denies applicant the factual basis of a refusal to issue a visa is in conflict with 8 U.S.C. 1182(a)(28)(I) which entitles applicant to overcome the grounds of the refusal?

4. Whether an applicant has been denied an effective opportunity to overcome the stated ground for refusal when the reason given is at variance with the statutory basis cited for the action?

5. Whether the identical words in 8 U.S.C. 1182(a)(28) relating to the excludability of aliens can be invested with a meaning different from that ascribed to such words relating to deportability in 8 U.S.C. 1251(a)(6) by *Rowoldt v. Perfetto*, 355 U.S. 115?

STATUTE AND REGULATORY PROVISIONS INVOLVED

The statute, the Immigration and Nationality Act of 1952, 8 U.S.C. 1101, 1182(a)(28) provides in pertinent part:

> (a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States. . . .
>
> (28) Aliens who are, or at any time have been, members of any of the following classes:
>
> (A) Aliens who are anarchists;
>
> (B) Aliens who advocate or teach, or who are members of or affiliated with any organization that advocates or teaches opposition to all organized government;
>
> (C) Aliens who are members of or affiliated with (i) the Communist Party of the United States, (ii) any other totalitarian party of the United States, (III) the Communist Political Association, (iv) the Communist or any other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state,

(v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party, or (vi) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt: Provided, That nothing in this paragraph, or in any other provision of this Act, shall be construed as declaring that the Communist Party does not advocate the overthrow of the Government of the United States by force, violence, or other unconstitutional means;

(D) Aliens not within any of the other provisions of this paragraph who advocate the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship, or who are members or or affiliated with any organization that advocates the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship, either through its own utterances or through any written or printed publications issued or published by or with the permission or consent of or under the authority of such organization or paid for by the funds of, or funds furnished by, such organization;

(E) Aliens not within any of the other provisions of this paragraph, who are members of or affiliated with any organization during the time it is registered or required to be registered under section 7 of the Subversive Activities Control Act of 1950, unless such aliens establish that they did not have knowledge or reason to believe at the time they became members of or affiliated with such an organization (and did not thereafter and prior to the date upon which such organization was so registered or so required to be registered have such knowledge or reason to believe) that such organization was a Communist organization;

(F) Aliens who advocate or teach or who are members of or affiliated with any organization, that advocates or teaches (i) the overthrow by force, violence,

or other unconstitutional means of the Government of the United States or of all forms of law; (ii) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government, because of his or their official character; or (iii) the unlawful damage, injury, or destruction of property; or (iv) sabotage;

(G) Aliens who write or publish, or cause to be written or published, or who knowingly circulate, distribute, print, or display, or knowingly cause to be circulated, distributed, printed, published, or displayed, or who knowingly have in their possession for the purpose of circulation, publication, distribution, or display, any written or printed matter, advocating or teaching opposition to all organized government or advocating or teaching (i) the overthrow by force, violence, or other unconstitutional means of the Government of the United States or of all forms of law; or (ii) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or any other organized government, because of his or their official character; or (iii) the unlawful damage, injury, or destruction of property; or (iv) sabotage; or (v) the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship;

(H) Aliens who are members of or affiliated with any organization that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display, any written or printed matter of the character described in paragraph (G);

(I) Any alien who is within any of the classes described in subparagraphs (B), (C), (E), (F), (G), and

(H) of this paragraph because of membership in or affiliation with a party or organization or a section, subsidiary, branch, affiliate, or subdivision thereof, may, if not otherwise ineligible, *be issued a visa if such alien establishes to the satisfaction of the consular officer when applying for a visa* and the consular officer finds that (i) such membership or affiliation is or was involuntary, or is or was solely when under sixteen years of age, by operation of law, or for purposes of obtaining employment, food rations, or other essentials of living and where necessary for such purposes, or (ii) (a) since the termination of such membership or affiliation, such alien is and has been, for at least five years prior to the date of the application for a visa, actively opposed to the doctrine, program, principles, and ideology of such party or organization or the section, subsidiary, branch, or affiliate or subdivision thereof, and (b) the admission of such alien into the United States would be in the public interest. Any such alien to whom a visa has been issued under the provisions of this subparagraph may, if not otherwise inadmissible, be admitted into the United States if he shall establish to the satisfaction of the Attorney General when applying for admission to the United States and the Attorney General finds that (i) such membership or affiliation is or was involuntary, or is or was solely when under sixteen years of age, by operation of law, or for purposes of obtaining employment, food rations, or other essentials of living and when necessary for such purposes, or (ii) (a) since the termination of such membership or affiliation, such alien is and has been, for at least five years prior to the date of the application for admission actively opposed to the doctrine, programs, principles, and ideology of such party or organization or the section, subsidiary, branch, or affiliate or subdivision thereof, and (b) the admission of such alien into the United States would be in the public interest. The Attorney General shall promptly make a detailed report to the Congress in the case of each alien who is or shall be

admitted into the United States under (ii) of this subparagraph; . . . (Italics supplied)

22 C.F.R. 42.130(a) provides:

Procedure in Refusing Visas

. . . .The applicant shall be informed of the provision of law, or regulation issued thereunder, on which the refusal is based, and of any statutory provisions under which administrative relief is available. . . .

STATEMENT

Petitioners are each members of the faculty of the University of California at San Diego. Carlos Blanco, Robert E. Elliott, Edwin Fussell, Claudio Guillen, Frederic Jameson, and Donald Wesling and Andrew Wright, who is Chairman, teach in the Department of Literature, and Gabriel Jackson, who is responsible for interdisciplinary programs between the two departments, is the Chairman of the History Department. These petitioners are each citizens of the United States (R.A2)

Keith Lowe is their colleague and is a native and citizen of Jamaica. He had been admitted to the United States as a student, attended Harvard University, where he obtained his undergraduate degree, and Stanford University, which awarded him a degree as Doctor of Philosophy. He was an instructor at Howard University. In September, 1967, he was appointed an assistant professor of Literature at the University of California at San Diego. He is regarded as a scholar in the fields of African, Afro-American, Caribbean, and British Literature and served as Chairman of the Faculty Committee on Afro-American and Mexican-American Studies. (R.A1-3,4).

Based upon these qualifications, Lowe established his eligibility for the issuance of an immigrant visa as a member of a profession who because of his exceptional ability in the arts will substantially benefit the cultural interests of the United States. See 8 U.S.C. 1153(a)(3); 1182(a)(14). Although he was permitted to process his application while working and living in California, because of the specific requirements of 8 U.S.C. 1255(c), he was required, as a native of the Western Hemisphere, to appear before the United States Consul in Jamaica in order to obtain a visa to become a permanent resident of the United States. (R.A4).

All of Lowe's documents in support of his application for an immigrant visa had been submitted, including his birth, educational and employment records, and police certificates from each place where he had lived since age 14; reports from Immigration and Naturalization Service and from the Federal Bureau of Investigation were received, and the final Application for Immigrant Visa and Alien Registration was filed, when Lowe was invited to appear at the Consulate in Jamaica to submit to a medical examination and to "answer any questions deemed material to determining his eligibility", and to execute his application for an immigrant visa. See 22 C.F.R. 42.111-117. He departed from California during the spring vacation to keep his appointment scheduled for March 24-25, 1969. (RA4)

On March 25, 1969, when he was accorded an interview, the Vice Consul alleged that Lowe had been a member of Students for A Democratic Society, had been an officer of the "May 2nd movement" at Stanford University and had "taught a course on Mao Tse-Tung in the Free University of Palo Alto"

and inquired his beliefs as to Mao. (R.A4-5)

Lowe was for a brief period while a student at Stanford University a member of Students for A Democratic Society. His name had been submitted to the Office of the Dean of Stanford University as a member and vice president of the "May 2nd movement" without his consent, but he attended no meetings, performed no functions, engaged in no activities, made no contributions, and never held himself out or regarded himself as a member of that organization. He taught a seminar in the Free University of Palo Alto, but its subject was a specific thesis of a Chinese political writer, Lin Piao, that "a world village (the third world) exists in opposition to a world city (the metropolitan countries)". His views regarding Mao Tse-Tung were generally that Mao has improved the welfare of China but that he rejected the brutal methods and slaughter which accompanied the Chinese Revolution. (R.A4-5)

The Vice Consul used reports from the Federal Bureau of Investigation and the Immigration and Naturalization Service as the basis for her questioning. None of the contents of these reports was furnished to Lowe nor was he given allegations of specific conduct bearing upon his eligibility to receive an immigrant visa. (R.A4-5)

On May 13, 1969, Lowe was requested to report to the Consulate and was hand delivered a letter dated May 12, 1969, which states as follows:

> "This Embassy regrets to inform you that you have been found ineligible to receive a visa under the provisions of Section 212(a) (28) of the Immigration and Nationality Act. This section of the law excludes

from the United States persons who have been members of or who have supported with their personal activities any group or organization which evidences objectives considered contrary to the interests of the United States.

Under Section 212(a) (28) (I) of this Act, individuals who have been found inadmissible under the preceding subparagraphs of this section may overcome the ground of their ineligibility and be issued visas when they are able to provide evidence acceptable to the Attorney General that they have conclusively disassociated themselves from their former memberships and activities for a period of at least five years and that they have conducted themselves for at least five years in a manner which clearly indicates active opposition to the principles, doctrines, and groups with which they were formerly associated. In this connection, it would be necessary to establish a clear date on which you severed your association with the organization(s) upon which your present inadmissibility to the United States is based.

Please be assured that your visa application has received every possible consideration consistent with the visa laws and regulations of the United States and that the determination of ineligibility was reached only after a full review of all available information." (R.A-6)

Lowe requested the opportunity to examine the evidence upon which the letter was based. He was advised that all such information was classified. He was advised that the decision could not be appealed. Despite the statement in the letter that he had been found ineligible to receive a visa as a person who has been a member of or has supported any group or organization which "evidences objectives considered contrary to the interests of the United States" and "may overcome the grounds of. . . .ineligibility" and be issued a visa when he is "able to provide evidence

acceptable to the Attorney General" that he had "conclusively disassociated" himself from his "former membership and activities for a period of at least five years" and that he has conducted himself for at least five years "in a manner which clearly indicates active opposition to the principles, doctrines, and groups with which" he was "formerly associated", he was not advised of the identity of such groups or organizations and was not informed of the "principles (and) doctrines" with which he was formerly associated. (R.A5-7)

Each of the petitioners thereafter joined with Lowe, who has a continuing appointment as a member of the faculty at the University of California, (R.A2), in bringing an action against the Secretary of State and the Attorney General. In their complaint below they alleged that Lowe has been denied the opportunity to continue his employment by the University of California as an assistant professor of literature in that he is unable to assume his duties at the University; that the members of the Department of Literature have been deprived of Lowe's assistance in fulfilling the academic objectives of the Department of Literature, have been unable to schedule courses in the Department of Literature dealing with African and Black Literature, have been denied freedom of association, freedom of academic and scholarly interchange in the field of literature, and have suffered restrictions upon educational research, and have been irreparably damaged in the conduct of the academic programs of the Department of Literature; that the Chairman of the Department of History has been prevented from developing a complete curriculum relating to interdisciplinary programs involving African

History, the History of Black Peoples in various countries, including the United States, and their literatures, and has suffered an interference with his academic freedom, his freedom to engage in scholarly interchange with Lowe within the academic community of the University of California. (R.A7-8)

In their complaint below petitioners alleged also that they had been denied their First Amendment rights as academic scholars, that the determination that Lowe was ineligible to receive a visa pursuant to 8 U.S.C. 1182(a)(28) is contrary to law, and that Lowe had been denied an opportunity to overcome the charges against him to establish his eligibility for a visa. (R.A10)

A three-judge court was initially convened to determine the case, but following this Court's decision in *Kleindienst v. Mandel*, 408 U.S. 753 (1972), two judges withdrew. (R.A12) A motion to dismiss the complaint for lack of jurisdiction and for failure to state a claim upon which relief can be granted was entered by the District Court on June 22, 1973, without opinion. (R.A13) The Court of Appeals, similarly without opinion, affirmed the dismissal on December 10, 1974. (R.1)

REASONS FOR GRANTING THE WRIT

This case presents important issues regarding the rights accorded by Congress to aliens in establishing their eligibility to become permanent residents of the United States in the context of the First Amendment interests of American citizen university professors which this Court recognized in *Kleindienst v. Mandel*, 408 U.S. 753.

I

The first reason for granting the writ relates to the jurisdiction of the District Court to review the petitioners' complaint, a question decided by the three-judge District Court in *Mandel v. Mitchell*, 325 F. Supp. 620, 647-649 (E.D. N.Y., 1971), against the contentions of the defendants there, assumed but nowhere explicitly discussed, by this Court in its decision reversing the lower court.

(A) As in *Mandel*, petitioners have at stake substantial First Amendment rights. The academic and scholarly interchange between the citizen petitioners and their colleague, whose appointment as a member of the faculty is continuing, is within the ambit of freedom of speech which this Court has constantly protected. *Keyishian v. Board of Regents*, 385 U.S. 589, 603, *Baggett v. Bullitt*, 377 U.S. 360 and *Sweezy v. New Hampshire*, 354 U.S. 234.

In granting the motion to dismiss upon the ground that the "court lacks jurisdiction over the subject matter of this action", the District Court's ruling appears to be in conflict at least with the *sub silentio* holding of this Court in *Mandel*.

Insofar as the complaint is directed to the basis upon which an immigrant visa was refused to petitioner Lowe, the action here appears to be at least as strong, if not more compelling, than the footing in *Mandel*. There jurisdiction arose, apart from the constitutional grounds invoked, from an allegation of abuse of discretion by the Attorney General. Here jurisdiction is based upon a determination by the Attorney General and a binding "advisory opinion" to the American consul on a question of law,

(R.A2-3) and a claim of invalidity of a State Department regulation.

This Court has long since held that the determinations of the Attorney General as to the statutory eligibility of aliens for permanent residence are questions of law, which, even in cases involving the exercise of discretion, are subject to examination by the courts. See *McGrath v. Kristensen*, 340 U.S. 162 (1950); *Ceballos v. Shaughnessy*, 352 U.S. 599 (1957) *United States ex rel. Hintopolous v. Shaughnessy*, 353 U.S. 72 (1957); and *Dessalernos v. Savoretti*, 356 U.S. 269 (1958).

When *Mandel* is viewed in the context of these earlier decisions, it seems clear that the court below gave an unduly broad application to the narrow ruling of this Court there. Although the holding in *Mandel* was limited to the exercise of Executive discretion "on the basis of a facially legitimate and bona fide reason", the court below declined to review an administrative decision which involves no exercise of discretion, which, apart from the constitutional questions posed, raises solely an issue of a statutory right, and which fails to meet the test of being "facially legitimate." See *infra* at p. 22.

(B) Although the jurisdictional decision below appears to have been addressed to the "subject matter of this action" (R.A11-12), a question which petitioners suggest is subsumed in *Mandel*, a major contention of the defendants below was that petitioner Lowe, as an alien not in the United States, has no standing to seek judicial review of the actions by the Attorney General and the Secretary of State.

This issue, one of obvious importance to the enforcement

of rights granted by Congress, warrants examination by this Court especially in view of the trend of decisions involving judicial review of administrative actions both as they relate to aliens and as they relate to standing.

In 1915, two years before aliens were required to obtain visas to enter the United States,[1] this Court in the landmark case of *Geigow v. Ubl*, 239 U.S. 9, settled the question whether an excluded alien could challenge an adverse administrative decision. Mr. Justice Holmes, speaking for this Court declared:

> "The Courts are not forbidden by the statute to consider whether the reasons, when they are given, agree with the requirements of the Act. The statute by enumerating the conditions upon which the allowance to land may be denied, prohibits the denial in other cases. And when the record shows that a commissioner of immigration is exceeding his power, the alien may demand his release upon habeas corpus."

Significant here is the fact that, although this Court has had occasion to decide whether habeas corpus proceedings or declaratory judgment actions are the appropriate remedy for asserting statutory rights by excluded aliens, compare *Sbung v. Brownell*, 346 U.S. 906 with *Brownell v. Sbung*, 352 U.S. 180, petitioners are aware of no decision by this Court which holds that administrative actions contrary to statutory law are immune from

1 The requirement originated in a wartime Joint Order by the Labor and State Departments on July 26, 1917, which required aliens who sought to enter the United States to obtain visas in advance from American consuls. *Immigration and Nationality Laws*, 1953, p. 1042. The Visa Requirement became legislative in the Act of May 22, 1918, 40 Stat. 559, but did not become permanent on a continuing basis until the Act of May 26, 1924, 43 Stat. 153, 156, 161.

challenge by an alien, even one not within the United States.

The circumstances here, like those in *Chew v. Colding*, 344 U.S. 590, are especially appropriate for an examination of the question whether an alien outside of the United States may have judicial review of claimed acts of wrongdoing by the Executive.

If petitioner Lowe, were not a native of the Western Hemisphere, he would have been able to apply to a District Director of the Immigration and Naturalization Service for permanent residence in the United States pursuant to Section 245 of the Immigration and Nationality Act, as amended, 8 U.S.C. 1255, 8 C.F.R. 245. If the application were denied, the District Director would be required to state the "reasons therefor", 8 C.F.R. 245.2(4). The petitioner would be entitled to renew his application in proceedings before an immigration judge, where he would have the right to submit evidence in support of his application, to be advised of adverse information, unless there had been an express determination personally by the Commissioner of Immigration and Naturalization that the information is classified under Executive Order No. 11652 of March 10, 1972 (37 F.R. 5209), and is relevant to the national security and safety;[2] and to rebut adverse evidence which had been disclosed to him, 8 C.F.R. 242.16-17. If the immigration judge's decision were

2 The Commissioner has never made such a determination since the promulgation of the Executive Order. Gordon and Rosenfield, *Immigration Law and Procedure*, Sec. 7.9F(2), pp. 7-17. Compare with 22 C.F.R. 42.130, which instructs consular officers merely that the applicant shall be informed of the provision of law, or reguation issued thereunder, on which the refusal is based." See R.A6-7.

adverse, the petitioner would be entitled to appeal his decision to the Board of Immigration Appeals, 8 C.F.R. 3.1(2); and to secure judicial review of that final administrative decision in a Circuit Court of Appeals, 8 U.S.C. 1105(a).

Nothing in the legislative history of 8 U.S.C. 1255 suggests a purpose by Congress to make distinctions regarding access to the judiciary between natives of the Western and the Eastern Hemispheres, or even more discretely, between aliens in noncontiguous Western Hemisphere countries and adjacent islands, and those in Canada and Mexico, who may obtain judicial review of agency decisions in the exclusion proceedings involving their rights under the immigration laws. 8 C.F.R. 237.2; Gordon and Rosenfield, *Immigration Law and Procedure*, Sec. 8.6c, pp. 8-28. Its purpose was solely to deal with the "recurring problem of natives of Central and South America who come to the United States as nonimmigrant visitors and promptly seek permanent residence status"; S. Rep. No. 745, 89th Cong., 1st Sess., p. 22; because that "conduct is unfair to other Western Hemisphere aliens seeking permanent resident status and citizenship through intending immigrant procedures," 111 Cong. Rec. 20995, who must await the availability of a quota number. See 8 U.S.C. 1101 (a)(27); Section 21(a), Act of October 3, 1965, 79 Stat. 921 limiting the Western Hemisphere quota to 120,000 annually.

Except for a footnote in *Brownell v. Shung, supra*, 184, fn. 3 which states "We do not suggest, of course, that an alien who has never presented himself at the borders of this country may avail himself of the declaratory judgment action by bringing suit from abroad", this Court has never addressed itself to the question whether the Administrative Procedure Act, 5 U.S.C.

701, and the Declaratory Judgment Act, 28 U.S.C. 2201, are available to aliens abroad who seek a determination of rights conferred upon them by statute. But see *Rusk v. Cort*, 369 U.S. 367 regarding citizenship claimants.

Review of this question is especially warranted here. Unlike the assumed situation in *Sbung*, footnote 3, petitioner Lowe is not an alien "who has never presented himself at the borders of this country." He lived here for the length of time it took him to obtain an undergraduate degree at Harvard, a Doctor of Philosophy degree at Stanford, to serve as as instructor at Howard University, and for an additional year and a half as an assistant professor at the University of California (R.A1,2,4), when he was "invited" by the American Consul, armed with information which was to be used to deny him re-entry to the United States, to leave his home in La Jolla and his duties with the University at San Diego, to appear outside of this country, not at a border where he could still have access to the courts, but in an adjacent island (8 U.S.C. 1101(b)(5)), where, if the decision below is upheld, he is, by the fortuitous circumstance of being a native of Jamaica, denied an opportunity to obtain review of the rulings by the Attorney General and the Secretary of State which deny him rights under the immigration laws. In the light of *McGrath v. Kristensen, supra*, and other decisions of this Court establishing the right of an alien within the United States to litigate his eligibility for the exercise of discretion, petitioner Lowe would clearly have had the right, while living in California, had he known of the bar to have been invoked against him by the Attorney General and the Secretary of State, to have brought a declaratory judgment action, irrespective of the procedures

denied him by 8 U.S.C. 1255. Cf. *Ex parte Endo*, 283, 304 where this Court indicated that a pre-existing right of access to a court cannot be denied by "taking prompt action and presenting the courts with a *fait accompli.*" See also *Kokoris v. Johnson*, 195 F. 2d 518 (4th Cir.); *Estrada v. Abrens*, 296 F. 2d 690 (5th Cir.); and *Marcello v. Kennedy*, 194 F. Supp. 750 (D.C.) upholding jurisdiction in cases involving aliens deported from the United States. In those circumstances, different but comparable to those here, the courts were loathe to impute to Congress a purpose to deny the availability of judicial relief to aliens.

The issue here is of especial importance to natives of the Western Hemisphere who have residence in the United States, in view of the requirement that they, unlike Eastern Hemisphere natives living in this country, must go abroad in order to effect their return to this country as permanent residents. Unlike also the aliens in *DiMattina v. INS*, Petition for Certiorari pending, No. 74-202; *Dunn V. INS*, Petition for Certiorari pending, No. 74-321; *Faustino v. INS*, 432 F. 2d 429 (2nd Cir.) certiorari denied, 401 U.S. 921, and similar cases, they do not usually have a judicial determination of the issues which affect their eligibility to become permanent residents.

II

The second reason for granting the writ arises from the lower court's apparent determination that the "complaint fails to state a claim upon which relief can be granted." (R.A11, 13)

The statutory authority vested in the Secretary of State and the Attorney General to bar aliens who have engaged in certain proscribed activities or who have had forbidden beliefs is cou-

pled with the right of an "ineligible alien" to "establish. . . to the satisfaction of the Consular Officer (and if a visa is issued, subsequently to the satisfaction of the Attorney General) that there has been a termination of membership and that the applicant is and has been for at least five years prior to the date of the application for a visa, "actively opposed to the doctrine, program, principles, and ideology of such . . . organization. . ." and that his "admission . . . into the United States would be in the public interest". 8 U.S.C. 1182(a)(28)(I)

By refusing to disclose to Lowe the basis upon which he had been determined to be ineligible to receive a visa, namely the specific factual underpinnings of the conclusory statement that he had been found ineligible to receive a visa under the provision of Sec. 1182(a)(28) which sets forth extensive categories of memberships and behavior, he was denied the right to exercise the statutory benefit conferred upon him by Congress.

Since the effect of the decision below is to have denied review of a question of law, namely whether Lowe was entitled to be informed of the specific basis upon which his visa was denied, an issue "neither address(ed) nor decide(d)" in *Mandel*, (696) is posed here.

Assuming that "whatever the procedure authorized by Congress is due process as far as an alien denied entry is concerned," *Knauff v. Shaughnessy*, 338 U.S. 537, 544, the question is whether in affording an alien the statutory right to overcome a ground of ineligibility, Congress has not by implication at least require that the alien be given the effective

opportunity to exercise the right by knowing, in fact, the basis of the administrative ruling.

Significantly, as noted earlier, *supra* p. 16, the Immigration and Naturalization Service has confined its use of undisclosed information to those cases only in which the Commissioner makes an individual and personal determination that disclosure is precluded under Executive Order No. 11652, *supra*, for reasons of national security and safety. The State Department regulation which precluded disclosure to the petitioner, 22 C.F.R. 42.130(a), applies broadly and universally to all aliens who are refused visas and prevents consular officials from disclosing the factual basis of their decisions in all cases. See Visa Manual, 42.130, Form Prescribed TL-541, Cf. *Jay v. Boyd*, 351 U.S. 345, p. 358, where Mr. Justice Reed suggested that "arbitrary secrecy" may be invalid under the statute.

In view of the numerous decisions of this Court which require fair consideration of applications for governmental benefits in a variety of situations, an important question is raised whether the regulation is a valid implementation of the Immigration and Nationality Act, especially as applied here to deny the ameliorating benefit of 8 U.S.C. 1182(a)(28)(I). The decision below contrasts markedly with the approach adopted in *Mandel*. Despite the Government's urging that this Court adopt "a broad decision that Congress has delegated the waiver decision to the Executive in its sole and unfettered discretion. . . (and permitting) any or no reason . . . (to) be given," the Court relied instead upon the fact that the "Attorney General did

inform (Mandel) of the reason for refusing the waiver,"[3] and required that the reason be "facially legitimate and bona fide." (695, 696).

(B) A further question is raised by the specific ground relied upon in refusing the visa. The consular letter stated that Lowe was "found ineligible to receive a visa under the provisions of Section 212(a)(28) of the Immigration and Nationality Act" as a person who has been a member of or has supported a group "which evidences objectives contrary to the interests of the United States." (R.A14) The section cited does not contain the bar which is given to it by the administrative decision.

Compare 8 U.S.C. 1182(a)(27) which authorizes the consular officer or the Attorney General to bar aliens who seek to enter the United States "to engage in activities which would prejudicial to the public interest" of the United States. No such finding is made here. The inconsistency cannot be taken to be merely editorial because Congress itself has chosen to provide separate grounds of excludability for those aliens whose admission is "prejudicial to the public interest" and those aliens who have been anarchists or communists. Nor is petitioners' contention hypertechnical. Difficult as it may be to prove a negative under either ground of excludability, manifestly more specificity is available to establish opposition to anarchism and communism, proscribed by 8 U.S.C. 1182(a)(28) than to prove that Lowe supports no organization whose "objectives (are) considered

3 The alleged membership and beliefs which formed the basis of the questioning of Lowe cannot be assumed to have been the basis for the denial of the visa in the absence of evidence of the fact.

contrary to the interests of the United States", apparently within the ambit of the meaning but not the specific language of 8 U.S.C. 1182(a)(27).

(C) A further substantial question requiring review by this Court is whether different meanings are to be ascribed to the same words in the separate sections of the Immigration and Nationality Act dealing with exclusion and deportation. See 8 U.S.C. 1182(a)(28)(A) to (H) and 8 U.S.C. 1251(a)(6)(A) to (H). Cf. *Brownell v. Sbung*, 352 U.S. 180 regarding use of the word "final" as applied to exclusion and to deportation decisions.

Assuming that petitioner Lowe was denied a visa because of his brief membership in Students for a Democratic Society, or his nominal, nonconsensual association with the "May 2nd movement", his teaching as an instructor the views of Lin Piao, or his opinion that "Mao Tse-Tung . . . has improved the welfare of China" (R.A5), such associations and ideas could not conceivably form the basis for deportation under 8 U.S.C. 1251 (a)(6) in view of the decisions of this Court in *Rowoldt v. Perfetto*, 355 U.S. 115, and *Gastelum-Quinones v. Kennedy*, 374 U.S. 469, and other cases which have defined the nature of activity proscribed by the statute.

Although there is said to be plenary congressional power to make policies and rules for the exclusion of aliens, the courts nonetheless have the authority to determine how the congressional power has in fact been prescribed. This Court has done so on the very issues present in this case.

Since the Attorney General's ruling on the question of law involved here is binding on the Secretary of State and consular

officials abroad, 8 U.S.C. 1103(a), 1104(b), and 22 C.F.R. 42.130; the issue, never before assayed by this Court, is of such obvious consequence that it justifies the grant of the writ. Although the Attorney General will surely oppose review of the inconsistency between his application of political bars in the exclusion and in the deportation sections of the statute, the effect is poignantly anomalous for the petitioner, whose assumed proscribed association and ideas for which he could not have been deported were acquired in the United States.

If he were ruled excludable because of a conviction of a "crime involving moral turpitude" in the United States under 8 U.S.C. 1182(a)(9) could the Attorney General invest that phrase with a different meaning for the same words in 8 U.S.C. 125l(a)(4)?

Apart from the impact which this question has on the administration of the immigration laws generally, it has particular significance for natives of the Western Hemisphere who, as noted earlier, *supra*, p. 16 , are unable to adjust their status within the United States. A double standard of justice results because natives of the Eastern Hemisphere, who may acquire status as permanent residents in deportation proceedings, 8 U.S.C. 1255, 8 C.F.R. 242.17, albeit that they must be admissible as entering aliens, are not found excludable for proscribed political associations for which they are not deportable. See *Berdo v. INS*, 432 F. 2d 824 (6th Cir.)

The issue warrants resolution by this Court.

(D) An additional factor is a determination of the interplay of First Amendment rights of the citizen petitioners in determining

Lowe's statutory rights under 8 U.S.C. 1182(a)(28)(I). Although this Court found it unnecessary in *Mandel* "to balance First Amendment Rights against governmental regulatory interests", that was in a case which involved solely the exercise of discretion and in which the exercise was found to be "facially legitimate and bona fide", (693, 696)

Unlike *Mandel,* Lowe was cut off at the bridge before the exercise of discretion was reached. Cf. *Jay v. Boyd, supra.* As a result the consul was not able to make the finding required by 8 U.S.C. 1182(a)(28)(I)(ii)(b) that Lowe's admission into the United States "would be in the public interest". An explication by this Court is needed as to the nature of the balancing required when the alien is an intending immigrant and when his academic colleagues require his presence for an ongoing educational program in a university, and when, solely questions of law are involved. Without further guidance from this Court, the import of *Mandel* in other cases will be left unclear.

The questions raised here are of importance to the administration of the immigration laws, of profound significance to a university community which requires an international interchange of scholars, and to those aliens upon whom Congress has intended to confer various benefits.

CONCLUSION

For the reasons advance, it is urged that this peition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

United States Court Of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1933

September Term, 19 74
Civil No. 1030-72

Keith Lowe,

Appellant

v.

Secretary of State, et al.

United States Court of Appeals
for the District of Columbia Circuit

FILED DEC 19 1974

HUGH E. KLINE
CLERK

Appeal from the United States District Court for the District of Columbia.

Before: Robinson and Robb, Circuit Judges, and Markey*, Chief Judge, United States Court of Customs and Patent Appeals.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. *See* Local Rule 13(c).

On consideration of the foregoing, It is ordered and adjudged by this Court that the judgment---------- of the District Court appealed from in this cause is hereby affirmed.

Per Curiam
For the Court
Hugh E. Kline
Clerk

*Sitting by designation pursuant to 28 U.S.C. § 293(a) (1970).

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